

**Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In re: Further Implementation of  
Section 309(j) of the Communications  
Act -- Competitive Bidding

Narrowband PCS

Broadband PCS

PP Docket No. 93-253

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**REPLY COMMENTS IN RESPONSE TO  
THIRD MEMORANDUM OPINION AND ORDER  
AND FURTHER NOTICE OF PROPOSED RULEMAKING**

The Law Firm of John D. Pellegrin, Chartered, herewith files Reply Comments in response to the Commission's request for such in its December 23, 1994 Public Notice. The December 23rd Public Notice primarily addresses the upcoming **Broadband** auctions of Blocks C and F, combining various blocks, installment payment coverage, and technical issues.

The Commission contemporaneously issued a Public Notice on December 21, 1994 in this same docketed proceeding, raising companion issues about upcoming **Narrowband** auctions, and Designated Entity treatment extensions to encourage continued and hopefully even greater participation by DEs. These Reply Comments are intended to address both Commission requests for input as to refining its PCS auction Rules and policies.<sup>1</sup>

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<sup>1</sup>Sufficient copies of these Reply Comments are being filed for inclusion in both companion proceedings. Because the Commission has stated its desire to improve its auction procedures and make

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**Request for Similar Treatment of General Partnerships as Corporations for Bidding Credit and Related Purposes.**

The Commission should change its approach with respect to one form of business entity; i.e., **general** partnerships. The change requested follows:

General partners, for purposes of bidding credits in any upcoming PCS auctions, should be treated as if they are shareholders of a corporation or any other equity interest/entity; i.e., their respective interests within the partnership should be looked at and given full credit vis-a-vis bidding credits. Said another way, if there are a sufficient number of general partners who are minority/female and who in turn constitute control of the partnership for FCC purposes, then that general partnership entity should receive the full bidding credit and other benefits which flow to such DEs as are presently authorized by the Commission.

Currently, the Commission treats a general partner in either a limited partnership or general partnership as if any such single general partner **controlled** such partnership. (Section 24.709 (b) (6) (i) (B).) This is simply unrealistic, particularly in a **general** partnership with potentially numerous general partners, all with equal voting power. Thus, for bidding purposes, the

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such as equitable as possible, acceptance of these Reply Comments with respect to the Commission's December 21, 1994 Public Notice is requested.

Commission should treat such general partnerships the same as a corporate-type entity.

The Commission has in the past held that each general partner was to be presumed to be in **control** of a partnership because of the Commission's and Congress's then concern with **alien** ownership of U.S. licensed communications facilities (broadcast, and to a lesser extent, common carrier). Moving Phones Partnership L.P., 73 RR 2d 762 (D.C. Cir. 1993). Now, with legislation proposed which would greatly reduce or eliminate the foreign ownership restrictions contained in Section 310 of the Communications Act, this concern should become moot. (See "Discussion Draft," released January 31, 1995 by Sen. Larry Pressler, Chairman, Senate Committee on Commerce, Science and Transportation S. \_\_\_, 104th Cong.)

The Commission's current PCS Rules are unfair to general partnerships in particular since the Rules require that **all** general partners be minority and/or female to qualify for bidding credits. See Fifth Report and Order, PP Docket No. 93-253 (released July 15, 1994), 75 RR 2d 859, at para. 158, fn. 34: "For purposes of our rules, we presume that any general partner has the power to control a partnership. Therefore, each general partner in a partnership will be considered part of the partnership's control group." See also Fifth Memorandum Opinion and Order, PP Docket No. 93-253 (released November 23, 1994), 76 RR 2d 945, at para. 59: "In the case of partnership applicants, the control group must own all the

general partnership interests."

As Commission case law developed, it has been called upon numerous times to deal with **limited** partnerships and to check whether the limited partners were exercising impermissible or attributable control over the applicant. The Commission somewhat gravitated to the common law and Uniform Partnership Act's principle that general partners in a limited partnership have legal control thereof. Invariably, such limited partnerships had numerous limited partners, but only one, two or a handful of general partners.

But in a general partnership, while all partners may have equal unit voting rights, no one of them can said to control the partnership in any meaningful way vis-a-vis FCC concerns. Rather, only a majority in interest of such partnership can control the important aspects of the entity. Indeed, only by vote can important decisions be taken by the general partnership.

Thus, the Commission's heretofore traditional view that any **one** general partner can **control** a partnership is simply not realistic. Indeed, a general partner cannot take a position on behalf of the partnership except after he/she has received authority to do so from a managing standpoint, and sometimes only by majority vote of the partnership as a whole.

The Commission is asked to recognize this real-world business fact, and merely give credit to such minority/female structured general partnerships such that the equivalent of only a control group (here, 15% of the partnership itself), need be

minority/female to qualify for the general bidding credits the FCC has already established. (Section 24.709 (b)(6)(i)(c))

With new legal entities being recognized, such as the Limited Liability Company (LLC) which combines features of both a corporation and partnership), the Commission should recognize that general partnerships should be treated the same as other business entities for bidding purposes and credits. Thus, when the Commission speaks of minority/female ~~majority~~ ownership or control of the control group of an applicant, this is all that should be required of general partnerships.

Throughout its PCS Rule refinements, the Commission recognizes, as did Congress, that minorities and women have had and continue to have a difficult time in aggregating sufficient resources to bid in the PCS auctions. To its credit, the Commission has been in the forefront of establishing and modifying its attribution and related rules to liberalize qualifying for bidding credits, more favorable interest rates on successful bids' installment payments, tax credits, and related rule expansions to assist minorities/women in having a fair chance to obtain and establish these new communications facilities. (Fifth Memorandum Opinion and Order, supra, released November 23, 1994, and Erratum, released January 10, 1995), para. 64) Therein, the Commission noted that an entity's "control group" had to maintain a 25 percent minimum equity requirement, but only 15 percent net (i.e., 60 percent of the control group's 25 percent equity holdings) had to be held by qualifying (minority/female/small business), controlling

principals.

The Commission's specific example in its Rules illustrates what we seek as a change in the current general partnership policy: "For example, if the applicant seeks minority or women-owned status, the 15 percent equity, as well as 50.1 percent of the voting stock of the control group and all of its general partnership interests, must be owned by control group members who are minorities and/or women." Erratum, supra, at para. 64 (emphasis supplied). The Commission goes on in the above **Erratum** to describe what it considers to be "control" of an applicant, both de jure and de facto, coming back to the requirement that "all general partnership interests" must be held by minorities/females. The Commission has even reduced the equity percentage that the control group must hold (from 50.1 percent to 30 percent if at least one of three conditions is met; i.e., the non-minority/female equity owners in the control group/applicant are members of the applicant's management team, existing investors operating and earning revenues already, or noncontrolling institutional investors).

Applicants have chosen the general partnership format to take advantage of the relatively lower costs in establishing such, while giving each partner an equal voice in the partnership's affairs. Such partnerships may well be established with the goal in mind of focusing on one or two specific markets (MTAs or more likely, BTAs), particularly in the upcoming auctions for smaller BTA 10 MHz Broadband, and then Narrowband. Their resources are

not virtually limitless, as the Commission acknowledges in attempting to accommodate them, per Congressional and the FCC's own mandate. It is for this reason that qualifying for bidding credits and related benefits potentially becomes so much more important. Hence, the Commission should recognize this fact and allow entrepreneurs to structure themselves in such a way that they can compete with any other applicants. What is **not** sought here is an advantage -- rather, only **equality**. The Commission deals with "presumptions" in its treatment and review of attribution/control issues. All that is being asked here is that such "presumptions" be modified to allow general partnerships to be able to mirror-image corporations and any other business entity for **bidding credits** and related purposes; i.e., if there is a minimum percentage of minority/female general partners (net 15% as now proposed by the Commission) in a general partnership, then such general partnership entity should qualify per force for such similar treatment as any other entity so constituted.

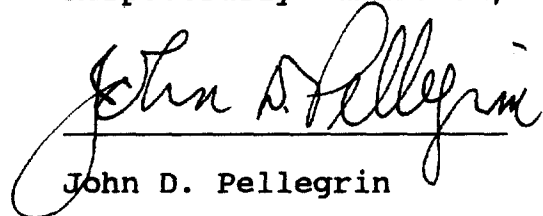
In other contexts, the Commission acknowledges that partnerships are not subject to formal prior approval for changes therein; rather, only pro forma consideration of such occurs. Thus, if one general partner leaves a partnership and at least three other general partners remain, there is no transfer of majority control such that long form prior approval from the FCC is needed to effectuate such change -- this, despite the fact that the Commission has generally spoken in terms of any single general partner being "in control" of the partnership for FCC purposes.

The Commission should follow such similar treatment of partnership interests, at least for bidding credit and related purposes.

Alternatively, waiver of the Commission's Rules may be in order with the filing of applications, or upon filing a long form application assuming the applicant is the successful bidder in a particular auction. The Commission has established such a waiver mechanism in its PCS Rules. However, individual applicant -- even blanket -- waiver requests are time consuming for the Commission, as well as the applicants, and a general ruling in advance of upcoming DE auctions would be far preferable.

WHEREFORE, it is respectfully submitted that the Commission modify its auction Rules to allow for bidding credits for those general partnerships which have minority/female partners in nominal control thereof (15% net of the total partnership interests).

Respectfully submitted,



John D. Pellegrin

Law Offices of John D. Pellegrin,  
Chartered  
1140 Connecticut Avenue, N.W.  
Suite 606  
Washington, D.C. 20036

(202) 293-3831

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